No. 83-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHARTER CONSOLIDATED, LTD., CHARTER CONSOLIDATED INVESTMENTS, LTD., and CENTRAL MINING FINANCE, LTD.,
Petitioners,

—v.—

ANTHONY A. BARBER, et al.,
Respondents.

PETITIONERS' BRIEF IN REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 9, 1984

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioners Charter Consolidated, Ltd., Charter Consolidated Investments, Ltd., and Central Mining Finance, Ltd. (collectively "Charter" or "petitioners") hereby reply to the briefs of respondent PPG Industries, Inc. ("PPG") and plaintiffs-respondents ("plaintiffs") (collectively "respondents").

ARGUMENT

I. The Pennsylvania Courts Did Not Apply The Proper Legal Standard In Asserting Jurisdiction Over A Foreign Parent Corporation On The Basis Of The Forum-Related Activities Of Its Subsidiaries

In opposing Charter's petition, plaintiffs have suggested that Charter's arguments "reduce[ ] fundamentally to a dispute

over the facts," Brief In Opposition of Plaintiffs-Respondents [hereinafter cited as "Plaintiffs' Brief"], at 8; they seek in this fashion to trivialize the issues Charter has raised. This Court should not be misled by the plaintiffs' attempts to characterize this case as the application of well-settled principles to disputed facts. *Id.* at 8-9 n.7. At issue here is more than a factual dispute. The Pennsylvania courts devised a new, and considerably more relaxed, standard for "piercing the corporate veil" and thereby subjecting foreign parent corporations to the jurisdiction of Pennsylvania courts. In so doing, they disregarded this Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), and the sixty years of precedent that have followed it.

The depiction of the issues before this Court offered by respondent PPG is considerably more forthright, and far more faithful to the Pennsylvania Superior Court's decision. PPG argues, quite simply, that *Cannon* is no longer good law, stating,

> the fact of the matter is that the *Cannon* case, however valid under 1925 jurisdictional conceptions, is wholly uninformed by subsequent due process jurisdictional analysis and was correctly perceived by the Pennsylvania courts to be of limited value in assessing whether Charter should be subject to this suit in Pennsylvania.

Brief of PPG Industries, Inc. [hereinafter cited as "PPG's Brief"], at 10. PPG further argues that "*Cannon* does not reflect current jurisdictional thought," *id.*, and refers this Court to cases "which have recognized that *Cannon* does not provide a viable jurisdictional analysis," *id.* at 11 n.11.

Both plaintiffs and PPG argue that *Cannon* has been undermined by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Plaintiffs' Brief at 8-9, n.7; PPG's Brief at 10-11. The questions presented in *International Shoe* and in *Cannon* were quite different. *International Shoe* involved a foreign corporation that had limited contacts with the forum state; the question before this Court was whether such contacts, although minimal, were sufficient so that the assertion of jurisdiction

over the corporation did not offend due process. In *Cannon*, by contrast, this Court addressed the question of what relationship between a foreign parent and a domestic subsidiary would be sufficient to permit the assertion of jurisdiction over the parent.

This Court has never held that *International Shoe* undermined *Cannon*. Indeed, four years after the *International Shoe* decision, this Court recognized the continued validity of *Cannon* in *National Carbide Corp. v. Comm'r of Internal Revenue*, 336 U.S. 422, 438-39 n.21 (1949). Nor has this Court ever held that the ownership of stock of a domestic subsidiary is a "minimum contact" sufficient to subject a parent corporation to the jurisdiction of the forum state. Because the question of whether *International Shoe* overruled *Cannon* is one on which the parties differ, and because the question has obvious significance to the many courts asked to assert jurisdiction over foreign corporations, this Court should take this opportunity to resolve that question.

In their opposing briefs, respondents attempt to depict Cape and Pandrol as mere appendages of Charter. Despite their efforts, certain facts are beyond dispute: both Cape and Pandrol are separate corporations, with separate management personnel, offices, books and records, and bank accounts; both engage in extensive and wide ranging business activities; neither is a sham entity, devised to shield Charter from liability. In the case of Cape, Charter owns only 67.3 percent of its stock, and Cape's board is accountable to those public shareholders who hold the balance of Cape's stock.

Although both plaintiffs and PPG seek to put a more sinister gloss on these relationships, it is apparent that Charter's relations with these subsidiaries are not in any way atypical. Through its representatives on the Cape and Pandrol boards, Charter participates in major policy decisions; it is not, however, involved in the day-to-day operations and management of either entity. The importance of this case resides in the lower courts' conclusion that such a relationship is sufficient to render Charter the *alter ego* of both Cape and Pandrol. The lower courts found nothing unique in the Char-

ter-Cape or Charter-Pandrol relationships to justify ascribing the acts of the subsidiaries to the parent. It follows that *any* parent corporation, subjected to the analysis performed by the courts of Pennsylvania, would be held subject to the jurisdiction of the Pennsylvania courts by virtue of a subsidiary's presence there. Neither party opposing Charter's petition really disputes this conclusion, or suggests what additional factors would be necessary to show that the parent is sufficiently separate from the subsidiary such that the parent would be beyond the jurisdiction of Pennsylvania.

However the Charter-Cape and Charter-Pandrol relationships are characterized, they are certainly much more distant than that between the parent and subsidiary in *Cannon*. There, Justice Brandeis stated that the parent dominated the subsidiary "immediately and completely." 267 U.S. at 335. If such a relationship was an insufficient premise for jurisdiction over the parent in *Cannon*, then the far more distant relationships between Charter and its subsidiaries are surely insufficient here. To conclude otherwise is to reject the authority of *Cannon*, and that is precisely what the Pennsylvania courts have done.

While it is not the function of this Court to resolve factual issues, neither should the Court be influenced by misleading factual statements regarding the nature of Charter's relationship with its subsidiaries. Respondents' briefs, particularly the brief submitted by plaintiffs, contain very serious misrepresentations.

The most significant of these misrepresentations is the claim that Charter itself participated in activities which gave rise to the cause of action. Plaintiffs' Brief at 2, 6, 7. It is regrettable that the plaintiffs have chosen to mislead the Court in this fashion. Charter has never mined, manufactured, or marketed any asbestos products. Furthermore, Cape has never consulted Charter on a wide variety of policy matters relating to asbestos, including prospecting, marketing, pricing, and health warnings. (R. 1142a; R. 1240a-41a; R. 1376a-77a; R. 1431a).[1]

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1 "R." refers to the Record on Appeal filed with the Superior Court of Pennsylvania.

Neither the Superior Court nor the trial court found that the cause of action arose out of activities in which Charter participated.[2] Nor does PPG make any such claim in its submission to this Court.

Although space limitations do not permit a thorough rebuttal to all of respondents' factual arguments, Charter notes a few of the more serious distortions.

1. Respondents contend that Charter "is merely a holding company . . . [which] does not conduct any business other than the business conducted through its subsidiaries." PPG's Brief at 3-4, 13. Charter is a diversified company whose principal activities are finance and investment. In addition to holding a wide range of investments, Charter performs a variety of services for approximately 50 corporate clients. These include corporate secretarial services, share registration, consultation on technical aspects of mining, buying and selling of precious metals, and financial advice. (R. 1280a-81a; R. 1286a-89a). Charter also acts as an underwriter and has underwritten all of Cape's recent public offerings. (R. 1096a-97a; 1127a; 1138a-40a; 1261a; 1307a).[3]

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2 This Court should not be misled by plaintiffs' technique of combining excerpts from the Superior Court's opinion with statements of their own design. An example appears at Plaintiffs' Brief at 6: "[i]n exercising its control over Cape, as the Superior Court found, Charter 'participated in Cape's important business decisions' (Petition App. B at 10a), which covered the gamut of Cape's activities—including those giving rise to plaintiffs' cause of action." Other examples of this technique can be found in Plaintiffs' Brief at 7-8, 9 n.7.

3 Respondents' characterization of Charter changes with the requirements of the argument they wish to advance. When they wish to pierce Charter's corporate veil, they describe Charter as a mere holding company, with no business of its own. PPG's Brief at 3-4, 13. However, when they wish to maintain jurisdiction over Charter on the basis of its employees' visits to Pennsylvania, they argue that "Charter's activities in Pennsylvania were fee-generating activities going to the heart of Charter's principal business concerns," and that "Charter has unquestionably sought to exploit Pennsylvania's market to advance Charter's core business interests." Plaintiffs' Brief at 12, n.10.

2. Respondents contend that Charter indicated that it would stand behind financial obligations incurred by Cape. PPG's Brief at 6. The record reveals, however, that Charter never informed Cape that it was willing to stand behind any of Cape's loans or bank overdrafts. (R. 1070a-71a; R. 1408a; R. 32b).

3. Contrary to PPG's suggestion that Charter's consolidation of its financial statements with those of Cape indicates unusual interdependence between the companies, PPG's Brief at 6, Charter is required by English law to consolidate the accounts of a majority-owned subsidiary. (R. 1416a; R. 1448a; R. 33b). Charter is similarly required by law to identify its subsidiaries in its Annual Reports.

4. PPG argues that "Charter dictated a restructuring of Cape's management soon after obtaining control of Cape in 1969." PPG's Brief at 5. However, Charter's representatives on Cape's board did not prompt the replacement of Cape's managing director, R.H. Dent, with G.A. Higham. Rather, all of Cape's directors decided to suggest that Mr. Dent relinquish certain managerial responsibilities in light of his age. (R. 1362a-64a; R. 1478a-79a). Mr. Dent, and not Charter, chose Mr. Higham as his successor, and this selection was later ratified by Cape's directors.

5. PPG argues that "Cape invariably followed the recommendations of the Charter members of Cape's Board concerning dividends to be declared to Charter and other business matters before the Cape Board." PPG's Brief at 5. The record shows that business proposals were initiated by Cape management, and not by Charter representatives. (R. 1493a-95a; R. 28b-30b). In addition, since it was the practice of Cape's board to reach decisions by consensus, there were no occasions for Charter's representatives to be "outvoted" as respondents suggest, PPG's Brief at 5; Plaintiffs' Brief at 6. (R. 1216a-19a; R. 1460a-62a; R. 1494a-95a; R. 27b).

6. PPG contends that Cape "has declared it will never again appear in an asbestos-related lawsuit in the United States" and that Charter has the ability to control this decision. PPG's Brief at 13, n.12. The record contains no such "declaration" or anything approaching it. The record further demonstrates that the decision to default in this case was made by Cape management, not by Charter. (R. 1142a-43a; R. 1382a).

II. The Pennsylvania Courts Violated The Due Process Clause Of The Fourteenth Amendment When They Asserted Jurisdiction Over Charter On The Basis Of Five Isolated And Unrelated Visits To The Forum State

At issue here is the level of activity sufficient to establish jurisdiction over a foreign corporation where such activity is unrelated to the cause of action. As petitioners previously noted, the same issue was before the Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 52 U.S.L.W. 4491 (U.S. April 24, 1984), *rev'g* 638 S.W.2d 870 (Tex. 1982). Petition at 16. Like the petitioner in *Helicopteros*, Helicopteros Nacionales de Colombia, S.A. ("Helicol"), Charter has never been authorized to do business in the forum state, never maintained an office in the state, never had an agent for service of process in the state, never had employees based in the state, and never recruited employees in the state. *See id.*, 52 U.S.L.W. at 4491, 4493.

In *Helicopteros*, Helicol's contacts with Texas, the forum state, consisted of visits by its chief executive officer to engage in contractual negotiations, acceptance of checks drawn by an in-state bank, purchases, and training sessions. *Id.*, 52 U.S.L.W. at 4491, 4493. This Court held that such contacts did not constitute "continuous and systematic general business contacts." *Id.*, 52 U.S.L.W. at 4493.

Charter has even less connection with Pennsylvania than Helicol had with Texas. First, the five visits to Pennsylvania by Charter employees were entirely unrelated to each other. In *Helicopteros*, by contrast, Helicol acknowledged that all but

one of its contacts with Texas related to a single transaction. Brief Of Petitioner In Reply To Brief Of Respondent In Opposition To Petition For Writ of Certiorari To The Supreme Court of Texas, [hereinafter cited as "Helicol Reply"], *Helicopteros*, 52 U.S.L.W. 4491, at 2, 3. Unlike the diverse visits to Pennsylvania by Charter employees, the majority of Helicol's contacts with Texas were in furtherance of a common purpose. Since Helicol's activities were deemed an insufficient predicate for jurisdiction, Charter's isolated trips certainly "cannot be described or regarded as a contact of a 'continuous and systematic' nature, as *Perkins* [*v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)] described it . . . and thus cannot support an assertion of *in personam* jurisdiction . . . ." *See Helicopteros*, 52 U.S.L.W. at 4493.

Moreover, Charter's visits to Pennsylvania reveal quantitatively less connection with the forum than the multiple visits by numerous personnel which this Court deemed insufficient as a jurisdictional predicate in *Helicopteros*. *See id.* Charter's contacts with Pennsylvania are confined to one securities transaction through an in-state broker, and five isolated trips by four Charter employees. Helicol's contacts consisted, *inter alia*, of substantially more visits by many employees. *See* Helicol Reply, App. at 80a.

Furthermore, the visits to Pennsylvania by Charter employees were incidental to its business. In 1979, Charter's net assets totalled approximately £340,000,000 and its earnings were approximately £44,000,000 (R. 545a). There is no indication in the record that Charter derived any income from the five visits of its employees to Pennsylvania during this period. Helicol, in contrast, purchased substantially all of its helicopter fleet in the forum state and conducted approximately $4,000,000 worth of business there. Helicol Reply at 3.

After *Helicopteros*, it is clear that the visits of Charter employees to Pennsylvania do not amount to a continuous and substantial course of business activity and cannot furnish a basis for jurisdiction over Charter. Realizing this, the plaintiffs argue on at least three occasions that these visits are merely an alternative basis for jurisdiction, and that this Court need not

measure them against the *Helicopteros* standard. Plaintiffs' Brief at 2, 10 n.8, 12 n.10. This argument misstates the Superior Court's conclusion and the grounds on which it is based. The Superior Court premised jurisdiction over Charter on the totality of its supposed contacts, both direct and indirect. Even PPG recognizes this; it argues that the lower courts asserted jurisdiction based on "the aggregation of Charter's direct contacts and the contacts of its subsidiaries." PPG's Brief at 14.

Because the Superior Court's assertion of jurisdiction was based on an aggregation of factors, it is by no means clear that Charter's direct contacts with Pennsylvania simply furnished an "alternative holding," as plaintiffs would have it. These direct contacts are an insufficient basis for jurisdiction under *Helicopteros*, and a reversal in accordance with that opinion is required.

CONCLUSION

For the reasons stated herein, and in the Petition, petitioners respectfully urge that the petition for a writ of certiorari be granted.

Dated: May 9, 1984

Respectfully submitted,

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